IN THE SUPREME COURT OF THE UNITED STATES

October Term 1977

No. 76-1168

STATE OF ARIZONA,
RICHARD BOYKIN, SHERIFF,
PIMA COUNTY, ARIZONA,

Petitioner,

vs.

GEORGE WASHINGTON, JR.,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the
Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

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REFERENCES IN PETITIONER'S REPLY BRIEF

All ellipses and abbreviations employed in the Petitioner's Brief, and explained therein at pp. 1-4, have been adopted in the Petitioner's Reply Brief, with the following additions:

(a) The Brief for the Petitioner, filed with the Supreme Court of the United States on June 20, 1977, will be referred to as "Pet. Br." when appropriate;

(b) The Brief for the Respondent filed with the Supreme Court of the United States on August 17, 1977, will be referred to as "Resp. Br." when appropriate; and

(c) All references made to the Superior Court Transcript of the Jury Trial of January 8, 1975 (not Mr. Bolding's Voir Dire of the Jury Panel, but

instead the transcript of the entire trial) will be referred to as the "Major Jury Transcript".

REFERENCE TO THE OPINIONS BELOW IN THE RESPONDENT'S BRIEF

Pursuant to U. S. Sup. Ct. Rule 23(1) (a), 28 U.S.C.A., the Respondent George Washington, Jr. lists as one of two opinions delivered in the courts below the Opinion of the Arizona Supreme Court, filed June 20, 1974 but unreported. [Resp. Br. 1.] Washington incorrectly represents both the chronological placement and legal nomenclature of this decision. Because he refers to this decision as an Opinion throughout his Brief to this Court, and because of the relative importance he gives to this decision therein, the State of Arizona wishes to correct this error.

First, the decision to which Washington refers was not delivered in the stream of appellate process which brought

this case to the Supreme Court, and is therefore not an opinion of the courts below within the context of the above-mentioned rule and is not subject to this Court's consideration for affirmance or reversal. [See Pet. Br., "Statement of Facts", pp. 18-22.] But more importantly, Washington mislabels this decision in his Brief as bona fide Opinion of the Arizona Supreme Court, thereby giving it the stature which an opinion from a highest state court is entitled.

In truth and in fact, the Arizona Supreme Court saw fit not to hand down an Opinion, but rather a Memorandum decision, and labeled it as such. [App. 7.] The difference between the two is that while bona fide Opinions are legal precedent, Memorandum decisions are not, and cannot be cited as such in any court. [See Pet. Br., "Relevant Constitutional

Provisions and Arizona Rules", p.11, for 17A A.R.S. Sup. Ct. Rules, rule 48(c) which codifies this prohibition.] The Ninth Circuit acknowledged and set out this prohibition in its Opinion. Arizona v. Washington, 546 F.2d 829, 832, n.2 (9th Cir. 1976).

For correction, the Memorandum Decision is represented as an Arizona Supreme Court Opinion on pages 1, 4 (n.2), 18, and 19 of Washington's Brief.

REPLY TO
JURISDICTIONAL STATEMENT

Washington urges that the State's petition for writ of certiorari was not timely filed because it was lodged with the Clerk of this Court more than thirty days after entry of Judgment of the Ninth Circuit, and cites for authority U. S. Sup. Ct. Rule 22(2), 28 U.S.C.A. [Resp. Br. 1-2.]

Rule 22(2) contemplates filing a petition for writ of certiorari to review the judgment of a court of appeals in a criminal case. While Washington is charged by the State of Arizona with the crime of murder, he has entered the federal court system on a writ of habeas corpus which is not a criminal proceeding. It is the granting of this writ in the District Court, and the affirming of

the District Court's decision by the Ninth Circuit that is before this Court on review. A habeas corpus proceeding is a civil remedy for enforcement of a person's civil right to personal liberty. Stewart v. Bishop, 403 F.2d 674, 677 (8th Cir. 1968); U.S. v. Masters, 484 F.2d 1251, 1253 (10th Cir. 1973). Therefore, time limits set forth in Rule 22(2) do not obtain in the case at bar.

Rule 22(3) provides that a petition for writ of certiorari "in all other cases" will be timely filed if lodged with the Court "within the time prescribed by law." 28 U.S.C.A. §2101(c) directs that a writ of certiorari which brings a judgment or decree in a civil action before the Supreme Court for review must be applied for within ninety days after the entry of judgment or decree. The judgment of the Ninth Circuit

was entered January 20, 1977. The State's petition for writ of certiorari was filed with the Clerk of this Court February 23, 1977, thirty-four days after entry of judgment.

Therefore, the State's petition for writ of certiorari was timely filed.

REPLY TO RESPONDENT'S STATEMENT OF THE CASE

Notwithstanding that Washington has placed differing emphasis on several of the events of the case at bar, his version of the Statement of the Case does not differ significantly from the State's presentation. However, the State deems it necessary, pursuant to U. S. Sup. Ct. Rule 40(3) and (4), 28 U.S.C.A., to correct the following inaccuracies and omissions in Washington's version.

First, in his Brief to this Court, Washington talks about the first motion for mistrial made by Mr. Butler, the County Attorney trying the case, following his counsel's opening statement to the jury:

> "That afternoon, the prosecutor moved for a mistrial on the following grounds: that

> defense counsel used some argument in his opening statement; that he, the prosecutor, didn't believe the defense would be able to produce witnesses referred to; that the defense shouldn't be allowed to put on evidence of <u>past prosecutorial misconduct</u> in the case; and that, if the motion for mistrial were not granted . . . ." (Emphasis added.)
>
> [Resp. Br. 7.]

No where in the transcript of Mr. Butler's first (or any) motion for mistrial does he refer to or argue against admission of evidence of "past prosecutorial misconduct", and it is inaccurate to infer that he does. This is a term long coined by Washington, not by the Courts,

and not by Mr. Butler. What Mr. Butler said to the trial court, and what Washington is referring to, is as follows:

> "Mr. Bolding does not want to try George Washington, he wants to try what happened four years ago in the handling of this case by the County Attorney's office. That issue has been decided by the courts. That issue should not be tried at this time, but Mr. Bolding has done everything he can to throw it in . . . . "
>
> [App. 190.]

Secondly, Washington has omitted from his Brief a material portion of his counsel's opening statement. The following is that part of defense counsel's statement which led to Mr. Butler's motion for mistrial on the grounds of jury

prejudice with the omitted part in emphasis:

> "You will hear testimony that notwithstanding the fact we had a trial in May of 1971 in this matter, that the prosecutor hid those statements and didn't give those to the lawyer for George, saying the man was Spanish speaking, didn't give those statements at all, hid them. Not this prosecutor. Prosecutor who has been taken off this case. [App. 180-181.]
>
> . . . .
>
> You will hear that that evidence was suppressed and hidden by the prosecutor in that case. You will hear that that evidence was purposely withheld. You will hear that be-

> cause of the misconduct of the County Attorney at that time and because he withheld evidence, that the Supreme Court of Arizona granted a new trial in this case. [App. 184.]" [Resp. Br. 7.]

Finally, where Washington explains defense counsel's retort to Mr. Butler's first motion for mistrial, specifically to the argument that defense counsel had told the jury about witnesses' testimony they were not going to hear. [Resp. Br. 8], Washington tells this Court that defense counsel "avowed [to the trial court] that though a continuance had been unsuccessfully sought to allow additional time to locate witnesses, he believed all the witnesses referred to would be located and called." The State wishes to dispell any inference cast that defense counsel was not given time to locate

witnesses before trial. On December 16, 1974, twenty-four days prior to the day defense counsel was making his avowal to the trial judge, a continuance had been asked for and granted. Although defense counsel had, on the first day scheduled for trial, asked for a continuance which was not granted, he had been given four weeks after his Motion to Dismiss was denied[1] to prepare for trial.

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[1]As set forth in the State's Brief [Pet. Br. 18-23], on June 20, 1974, the Arizona Supreme Court affirmed the trial court's granting of a new trial on the grounds of violation of due process and newly discovered evidence, and a new trial was set for August 21, 1974. In September, after that trial date had been vacated, a new trial date was set for November 19, 1974. Defense counsel filed

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a Motion to Dismiss and a Motion to Produce in early November 1974, and at a hearing on the Motion to Produce, a continuance was granted to December 18, 1974. On December 13, 1974, the Motion to Dismiss was denied. On December 16, 1974, a continuance was granted to January 6, 1975, when defense counsel again asked for a continuance which was denied.

REPLY TO RESPONDENT'S ARGUMENTS

Respondent's first argument [Resp. Br. 13-24] which, inter alia, debates the meaning of the Ninth Circuit's Opinion, is grounded upon his own interpretative statement of the questions presented for review in the State's petition for writ of certiorari. The State objects to Washington's reframed questions as an inaccurate restatement of those presented by the State, specifically his first question which is illogically structured. Therefore, the State will attempt to respond to Washington's arguments in his Brief within the structure of the questions presented to this Court for review and as set forth in the State's Brief [Pet. Br. 13] pursuant to U. S. Sup. Ct. Rule 40(1)(d)(1), 28 U.S.C.A.

I

THE OPINION OF THE NINTH CIRCUIT HOLDS THAT A TRIAL JUDGE MUST ARTICULATE HIS REASON(S) FOR GRANTING A MISTRIAL ON THE RECORD OR MUST INDICATE THAT HE CONSIDERED ALTERNATIVES TO MISTRIAL ON THE RECORD.

Washington's first topical heading states that the Ninth Circuit Opinion did not require a trial court to make specific findings of "manifest necessity" before granting a mistrial. [Resp. Br. 13.] The State agrees with Washington that the Ninth Circuit did not require those specific words uttered before granting a mistrial. However, his argument thereafter cuts much deeper and postulates that the Ninth Circuit does not require a trial judge to make any findings before

granting a mistrial. [Resp. Br. 13-14.] The State strongly opposes this interpretation given to the Ninth Circuit's Opinion.

In his Brief, Washington appears to disregard the context in which that Court stated "[w]e do not hold that these words are talismanic" [546 F.2d at 832], and excises this sentence from the Opinion to bolster his argument. "[T]hese words" which the Court holds not talismanic are "manifest necessity" and "ends of public justice", the cornerstones of the Perez[2] doctrine, not findings of any kind, as Washington argues. What they said follows:

> "In the absence of any finding by the trial court or any indication that the court con-

[2] United States v. Perez, 22 U.S. (9 Wheat.) 579, 6 L.Ed. 165 (1824).

sidered the efficacy of alternatives, such as an appropriate cautionary instruction to the jury, we must conclude that neither of the tests of Perez ('manifest necessity' or 'ends of public justice') has been met. We do not hold that these words are talismanic; we hold only that this particular record fails to reveal a 'scrupulous exercise of judicial discretion,' and that . . . ."

[Id.]

The State maintains that the Ninth Circuit does require a trial court to make a finding on the record of the legal reason why he declared a mistrial. The Opinion is replete with indications thereof, but one particular passage is unquestionable in its mandate to trial judges:

"However, we decline to imply from this impropriety [remarks made by defense counsel in his opening statement] that the jury was prevented from arriving at a fair and impartial verdict. If this was the case, the trial judge should have so found.[3] He at no time, however, indicates his reason(s) why he granted the mistrial." (Emphasis added.)

[Id.]

According to the Ninth Circuit, it is now requisite in a mistrial circumstance that

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[3]The State propounds its second question to this Court for review [See Pet. Br. 13, Questions Presented for Review] based on this directive, and that of Circuit Judge Merrill, infra at p.22 .

a trial judge make either a specific finding on the record reflecting his reason(s) why he granted a mistrial (such as in the case at bar "the jury is no longer able to reach an impartial verdict"), or some verbal indication on the record that he considered alternatives to mistrial. If neither a finding nor consideration of alternatives is found in the record, then a " 'scrupulous exercise of judicial discretion' " [546 F.2d at 832] has not been exercised and the double jeopardy clause precludes retrial of the criminal defendant.

The concurring opinion of Circuit Judges Merrill and Anderson offers corroboration for the State's construction of the Ninth Circuit's holding. In discussing the arguments of counsel to the trial judge, Judge Merrill decides:

"While manifest necessity was also argued on this occasion, absent findings that manifest necessity existed, it is quite possible that the grant of mistrial was based on the fact that the impropriety of counsel's conduct had been established without reaching the question whether there could, nevertheless, be a fair trial." (Emphasis added.)

[546 F.2d at 833.]

The Ninth Circuit seems possessed with the idea that since arguments of counsel centered around the impropriety of defense counsel's remarks, and equal time and effort were not given by counsel to arguing that jury prejudice, and therefore manifest necessity, existed for a mistrial declaration, the trial judge

most probably declared a mistrial because he concluded the remarks were improper, not because he concluded they had prejudiced the jury to the extent that an impartial verdict could no longer be reached.

Their rationale for this theory assumes a sequence of events which seems to place the finding of improper conduct before the finding of jury prejudice: that Judge Buchanan would first have determined the impropriety, or inadmissibility, of defense counsel's remarks made to the jury, then, would have determined the prejudicial effect of those remarks; that since there was no extended colloquy on the record between judge and counsel concerning jury prejudice, then "quite possibly" Judge Buchanan did not go on to reach the question "whether there could, nevertheless, be a fair trial." [Id.] The

Ninth Circuit ignores the likelihood of a reverse sequence of events--that Judge Buchanan had already concluded, solely from observing all that had transpired, that there existed the possibility,[4] or probability, of a biased panel; that

[4] See Pet. Br. 111-112 where the State cites Wade v. Hunter, 336 U.S. 684, 69 S.Ct. 834, 93 L.Ed. 974 (1949), United States ex. rel. Hetenyi v. Wilkins, 348 F.2d 844 (2nd Cir. 1964), United States ex rel. Stewart v. Hewitt, 517 F.2d 996 3rd Cir. 1975), United States v. Pridgeon, 462 F.2d 1094 (5th Cir. 1972), and Whitfield v. Warden of Maryland House of Correction, 486 F.2d 1118 (4th Cir. 1973) for long-recognized law that a trial judge does not abuse his judicial discretion by declaring a mistrial when there exists a reasonable possibility that the jury might be biased.

since the State was asking for a mistrial based on jury prejudice[5] the issue to be resolved was whether or not defense counsel's remarks were nonetheless legally proper.

It is well settled law that if

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[5] See App. 189; 190; 207, where Mr. Butler explains to Judge Buchanan "What [defense counsel] wants that jury to do is say, 'Look, this guy has spent that long a time in prison because the prosecutor is guilty of misconduct' and so, 'You should [sic] find him guilty now . ' The only reason he can want that in is to get the jury so mad at the State . ."; 222; 223; 227; 233, where Mr. Butler argues "It's the opinion of the State that no curative instruction given by the Court could in this case adequately cure

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defense counsel makes remarks in his opening statement concerning evidence that is admissible, a trial judge has no legal basis to declare a mistrial just because the remarks are prejudicial to the State's case. However, if opening remarks are made to the jury

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the damage that has been done by Mr. Bolding. . . . The State, the position of the State has been so prejudiced by his illegal and improper argument that . .": 241; 253; 268; 269-270, where Mr. Butler further stated "I think this jury cannot fairly sit and decide this case knowing that and I don't think any instruction is going to cure that. . . we have, I think, a situation where, because of the improper argument, the State cannot obtain a fair trial"; and 271.

concerning evidence that is not admissible, the trial judge has every right to declare a mistrial if there is a reasonable possibility that the jury might be biased from such remarks so that a fair trial is no longer possible. United States v. Dinitz, 424 U.S. 600, 96 S.Ct. 1075, 47 L.Ed. 2d 267 (1976), concurring opinion; State v. Burruell, 98 Ariz. 37, 401 P.2d 733 (1965).[6] Judge Buchanan acted responsibly in soliciting and listening

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[6]In State v. Burruell, even though defense counsel, in his opening statement, made remarks that were severely damaging to the State's case, because the statements concerned evidence that was held to be admissible (unlike the facts in the case at bar), the Arizona Supreme Court held that the State's motion for mistrial should have been denied.

to argument of counsel on the issue of the propriety of defense counsel's remarks, for the determination of that issue was critical to his valid declaration of mistrial.

The State argues that no such limited implications should be drawn from the record as has been done by the Ninth Circuit. It is untenable to conclude Judge Buchanan quite possibly failed to reach the question of whether or not the jury's mind had been tainted by defense counsel's prejudicial remarks. If Judge Buchanan did not consider jury prejudice as a basis for declaring the mistrial, as the Ninth Circuit speculates he did not, then what meaning is to be given to his early statement--

> "I was a little concerned with the poisoning of the panel, that someone might blurt out

[the reason for the new trial]

. . . ."

[Exh. 1 (Superior Court Transcript of the Jury Trial of January 8, 1975, Mr. Bolding's Voir Dire of the Jury Panel), p.35.]

Judge Buchanan, from his first realization that defense counsel planned to prove "that there was evidence hidden from George at the last trial" [Exh. 1, p.22], was responsive to the possibility of jury prejudice developing in Washington's second trial. When the possibility was substantially increased by defense counsel's opening statement, he responded by declaring a mistrial, but only after assuring himself that defense counsel was not entitled to present the evidence to prove his accusations that the State purposely withheld evidence from Washing-

ton and the Arizona Supreme Court granted a new trial because of that misconduct. Once the determination of inadmissibility was made, Judge Buchanan felt there existed the manifest need to declare a mistrial.

This Supreme Court held, not five years ago, that a mistrial declared in an Illinois state court "met the 'manifest necessity' standard of [its] cases since the trial could reasonably have concluded that the 'ends of public justice' " would have been defeated by allowing the trial to continue. (Emphasis added.) Illinois v. Somerville, 410 U.S. 458, 459, 93 S.Ct. 1066, 1068, 35 L.Ed. 2d 425 (1973). It would confound common sense and the record itself to state that from a review of all the circumstances Judge Buchanan could not reasonably have declared a mistrial be-

cause the remarks were prejudicial. Nevertheless, the Ninth Circuit held that he did not, evidently inattentive to the Somerville decision.[7] In its place was substituted their own standard:

If

NO FINDINGS BY THE TRIAL JUDGE ON THE RECORD

or

NO INDICATIONS BY THE TRIAL JUDGE THAT HE CONSIDERED ALTERNATIVES ON THE RECORD

then

NO SCRUPULOUS EXERCISE OF JUDICIAL DISCRETION

and, therefore,

ABUSE OF JUDICIAL DISCRETION AND VIOLATION OF THE DOUBLE JEOPARDY CLAUSE.

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[7] See Pet. Br. 96-97 for the State's argument that the Ninth Circuit further disregarded Somerville by excising portions of the Jorn Opinion to support their decision in the case at bar.

The rigid formula which the Ninth Circuit has propounded for analysis of judicial discretion seems in direct conflict with the majority decision in Somerville which cautioned against such mechanical devices:

> "[The Perez] formulation, consistently adhered to by this Court in subsequent decisions, abjures the application of any mechanical formula by which to judge the propriety of declaring a mistrial in the varying and often unique situations arising during the course of a criminal trial." 410 U.S. at 462, 93 S.Ct. at 1069.

It is this holding of the Ninth Circuit that the State has petitioned this Court to review, as it is contrary to the established law of this Court, and

of the Second, Third, Fourth, and Fifth Circuit Courts of Appeals.

II

THE REMARKS MADE BY WASHINGTON'S DEFENSE COUNSEL DURING HIS OPENING STATEMENT TO THE JURY WERE IMPROPER UNDER ARIZONA LAW.

Washington argues in his Brief that his defense counsel's remarks during the opening statement to the jury were proper. [Resp. Br. 15-19.] In support of this argument he correctly states that Arizona permits wide latitude in cross-examination and impeachment of witnesses. But his further argument reveals inconsistencies and inaccuracies in stating both the law and the facts of the case at bar.

Defense counsel's opening remarks concerning the State's suppression, hiding and purposeful withholding of evidence from Washington's lawyers, and that such "misconduct" occasioned the Arizona Supreme Court to grant[8] a new trial, have been held improper not only by the trial court as Washington states, but by the federal district court [App. 128] and by the Ninth Circuit [546 F.2d at 832].

[8]The State takes issue with the constant statement of Washington, both to the jury and to the federal appellate courts, that the Arizona Supreme Court "granted" a new trial to Washington. The Arizona Supreme Court affirmed the lower trial court's ruling that a new trial was warranted. The significance of this distinction becomes apparent with the following statement from the Memorandum de-

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Washington argues that the evidence his counsel told the jury he would present was admissible, and, therefore, that his remarks were totally proper.

The State has argued in its Brief to this Court [Pet. Br. 110, n.21] as it did to the Ninth Circuit [Appellee's Opening Brief, pp. 55-59] that the evidence was not legally admissible. What

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cision itself:

"It is well settled that an appellate court will not interfere with matters so peculiarly within the knowledge of the trial court unless an abuse of discretion existed. State v. Byrd, 94 Ariz. 139, 383 P.2d 555 (1963.)"

[App. 14.]

happened in Washington's first trial is irrelevant and immaterial to the guilt or innocence of Washington, as is the holding of the Arizona Supreme Court. Further, 17A A.R.S. Sup. Ct. Rules, rule 48(c) precludes the use of a Memorandum decision for such purposes as Washington intended.

But the statements that defense counsel made were improper for another reason. Washington's counsel knew they were untrue, and incapable of proof. The County Attorney's office did not purposely withhold evidence from Washington at his first trial, and although Washington argued to the Arizona Supreme Court that the County Attorney's office was guilty of intentional misconduct, the Arizona Supreme Court declined to so hold. That Court did not state that the

County Attorney was guilty of "misconduct", intentional or otherwise. That Court affirmed the lower trial court's ruling that a new trial was warranted on the grounds of a violation of due process and newly discovered evidence. As much as Washington would wish that finding, it does not exist.

Washington maintains in his Brief that "defense counsel's remarks in his opening statements did not require consideration by the jury of the Arizona Supreme Court Opinion".[9] The State is perplexed by this assertion. In order to prove that the Arizona Supreme Court granted a new trial for misconduct of the County Attorney in hiding, suppressing, and purposely withholding evidence from Washington during the first trial, the

[9] Memorandum Decision.

Memorandum decision would have to be introduced for the jury's consideration. Barring that, defense counsel could not prove for what reason the new trial was granted.[10]

Washington further contends that in any event the Arizona Supreme Court decision might have been admissible on the basis of a "judgment". Evidently, Washington urges this Court to equate this Memorandum decision, which the Arizona Supreme Court Rules do not allow as

[10] Unless he planned alternatively, as he stated to Judge Buchanan, to "subpoena the author of that opinion as well as the other members of the Supreme Court to testify in this regard" [App. 206] which is an evidentiary impossibility.

legal precedent,with a judgment of guilty or innocent in a criminal proceeding. The two are dissimilar in fact and in law.

The State deems it essential to again correct some significant inaccuracies in Washington's Brief. Therein, Washington states that "the prosecutor argued to the trial court that the State's case would be prejudiced by the revelation that the prosecution had previously sought to secure a conviction by improper means." [Resp. Br. 16-17.] No where in the transcript of the trial can such an argument be found. He further states that "the prosecution argued the broader and more deceitful the prosecutor's efforts to obtain a conviction by improper means, the less admissible such matters would be since in the Petitioner's mind they would put the State on trial." [Resp. Br. 17.]

This is utter fabrication. No such argument has ever been made by the State.

III

WASHINGTON IS NOT BEING HELD IN VIOLATION OF THE FIFTH AMENDMENT DOUBLE JEOPARDY CLAUSE.

The State has argued in its Brief to this Court the many reasons why jeopardy should not attach in the case at bar, and has cited for authority the pertinent federal cases that uphold the State's position. In Washington's argument that his retrial is barred by the double jeopardy clause [Resp. Br. 19-23], there is little if any analysis of the double jeopardy cases cited for support

of his position that need retort beyond what has been said in the State's Brief. Therefore, there will be no reiteration of that argument here. However, there are several cases mischaracterized by Washington, along with the conclusionary and factually unsubstantiated statements in his argument, and the State will respond to those in order.

For the precept that the double jeopardy clause protects an accused's "valued right" to have his trial completed by a particular tribunal, i.e., "his option to go to the jury at hand and perhaps end the dispute then and there, once and for all, with an acquittal" [Resp. Br. 20], which precept forms the backbone of his argument, Washington cites as authority therefor the Supreme Court cases of United States v. Dinitz,

supra, Illinois v. Somerville, supra, United States v. Jorn, 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed. 2d 543 (1971) and Downum v. United States, 372 U.S. 734, 83 S.Ct. 1033, 10 L.Ed. 2d 100 (1963). While it is true that both the Dinitz and Somerville decisions reiterate the historical holdings of cases as part of the developing rationale for their own holdings, it can hardly be said that those two cases stand for the foregoing proposition as espoused by Washington. The language he cites is from the holding of United States v. Jorn [400 U.S. at 484, 91 S.Ct. at 557], which case makes the right to a trial before a particular tribunal of utmost importance to a defendant, and which case the Ninth Circuit incorrectly adopted as precedent for the ruling in the case at bar. [See the

State's applicable argument in Pet. Br. 94-107.]

While the defendant's valued right to go to a particular tribunal for his verdict has always been considered crucial in the balance of interests before a mistrial is declared [Wade v. Hunter, supra, 336 U.S. at 688-689, 69 S.Ct. at 837], that "valued right" must in some instances be subordinated to the public interest in fair trials designed to end in just judgments. [Id.] Washington acknowledges this [Resp. Br. 22], but maintains that the single mention of the Arizona Supreme Court decision could not possibly have prejudiced his jury so that an impartial verdict could not be reached. It is relevant to note here that after urging in this Brief that his counsel's opening statement to the jury contained the claims

> "that evidence would establish (1) that the prosecution purposely withheld evidence from the defense, and (2) that because of such misconduct the Arizona Supreme Court had granted a new trial in this case" [Resp. Br. 15],

suddenly Washington downplays what was actually said to the jury to a "prosecutorial withholding of evidence." [Resp. Br. 22.] What was said by defense counsel (and more than a "single mention") should be clear at this point--that a prosecutor in Washington's first trial had hidden, suppressed, and purposely withheld evidence from Washington, that that prosecutor had been taken off the case, and that the Arizona Supreme Court granted a new trial because of that misconduct. [App. 180-181, 184.] Couple that series of

accusations in defense counsel's opening statement with his prior declaration to the jury in voir dire that evidence had been hidden from Washington [Exh. 1, p. 22], and with defense counsel's many and repeated references to "the prior trial"[11] and to Washington's prior conviction [Exh 1, pp. 27-28, App 182, 184], the question "whether an impartial verdict would have been reached in the trial that

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11 In voir dire of the prospective jurors, when defense counsel felt compelled to explain Mr. Butler's mention of "prior proceedings" as a "previous trial" (Exh. 1, p. 22, Pet. Br. 24], defense counsel asked the jurors, as the Ninth Circuit noted [546 F.2d at 831], to disregard this fact. "Can you lay that aside, can you not worry about that, think about

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was ongoing" [Resp. Br. 22] seems to answer itself. From all the statements that the jury heard, how could they give a fair trial to either side? The answer is, as Judge Buchanan must have realized, they could not.

Washington argues to this Court how valued his right had become to take his case to his second jury [Resp. Br. 21-23]--reciting his anxiety and insecu-

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this trial today and for the next 10 days? Would you do that, and not worry about the fact that we are in a new trial situation?" [Id.] Thereafter, that same defense counsel referred the jury to the prior trial of Washington a dozen times. [See Exh. 1, pp. 22, 27-28; Major Jury Transcript, pp. 68, 69, 74, 78, 90, 91, and 94.]

rity about the possibility of spending the rest of his days in prison (which is not unlike any other defendant awaiting trial for murder); about how he has already been "severely punished" for this crime in his pre-trial ordeal. [Resp. Br. 21]; and how positive was the posture of his case in this second trial, i.e., no prosecution eye-witnesses, several exculpatory witnesses, and a defense alibi witness. [Id.] In truth, Washington's case in defense of the charge, which he planned to present to his second jury, was not substantially different from that in his first trial. [See Major Jury Transcript, pp. 55-95 for the outline of his case in opening statement.] His "alibi witness", James Hanrahan[12] was in actuality not going to testify, even

[12]This is the witness whose testimony the Arizona Supreme Court ruled (Continued)

though defense counsel represented to the jury what this testimony would be. [See App. 196-198, where Mr. Butler argues to the trial court that Hanrahan had not been disclosed as a witness to the prosecution, had not been mentioned to the jury during voir dire as had Washington's other witnesses, had not been subpoenaed to be a witness even though Mr. Butler told defense counsel his whereabouts; and the evasive answers of defense counsel when asked if Hanrahan had been subpoenaed.] And although Washington tells this Court "[t]he prosecution had no eyewitnesses" [Resp. Br. 21], the State was, in this second trial, going to present

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the County Attorney suppressed from Washington at his first trial [See pp. 7-15, 35.]

Washington's accomplice, Alonzo Rodriquez, who was at the scene of the crime.[13]

So Washington's plea to this Court that his "right" to go to that jury was of inestimable "value" is not to be believed. If it were so important for Washington to have that jury decide his fate, as he argues now to this Court, why did not his defense counsel stand up before the trial judge and say so? Instead, he argued the propriety of his remarks. No where in the transcript of Washington's second trial is there found such a compelling plea to the trial judge to let Washington continue with his jury. Perhaps the truth is that the defense's

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[13]This accomplice did not testify in Washington's first trial because he remained at large until October 1974. [Major Jury Transcript, p.91.]

case, not the prosecution's case as Washington maintains [Resp. Br. 22], was weakening, and he needed "time between trials to strengthen his case."

The declaration of a mistrial did not prejudice Washington. A new trial was immediately scheduled for January 14, 1975, four days after Judge Buchanan's ruling.[App. 272.] Thereafter, Washington began his quest for appellate relief which has brought this case to the Supreme Court. Contrary to Washington's meaningless assertions in his Brief [Resp. Br. 21-22], there was no prosecutorial manipulation. In such a situation as presented by the record in the case at bar, where the mistrial is not attributable to prosecutorial or judicial overreaching, the defendant, George Washington, Jr., is barred from relying on a double jeopardy

defense. United States v. White, 524 F.2d 1249, 1252 (5th Cir. 1975); United States v. Dinitz, supra, 424 U.S. at 611, 96 S.Ct. at 1082.

IV

WHEN A TRIAL JUDGE FEARS THE POSSIBILITY OF JURY PREJUDICE AND HE DECLARES A MISTRIAL THEREFOR, THERE IS NO FACTUAL OR LEGAL NEED TO MAKE A RECORD OF CONSIDERED ALTERNATIVES.

Washington argues in support of the Ninth Circuit's holding that when a mistrial circumstance is (asserted to be) occasioned by jury prejudice, a trial judge should make a record of the considered alternatives to mistrial. [Resp.

Br. 23-24.]

As developed in the State's Brief to this Court, Washington's suggestion is contrary to established law in the Third, Fourth, Fifth, and Eighth Circuits. [14] These circuits adhere to the principle

[14] The following pertinent cases are explained in detail in the State's Brief at pp.129-141; United States v. Chase, 372 F.2d 453 (4th Cir. 1967), United States v. Smith, 390 F.2d 420 (4th Cir. 1968), United States v. Pridgeon, 462 F.2d 1094 (5th Cir. 1972), Whitfield v. Warden of the Maryland House of Correction, 486 F.2d 1118 (4th Cir. 1973), United States v. Hewitt, 517 F.2d 993 (3rd Cir. 1975), United States v. Barclift, 514 F.2d 1073 (9th Cir. 1975), Parker v. United States, 507 F.2d 587 (8th Cir. 1974); United States v. Walden, 448 F.2d 925 (4th Cir. 1971).

that when the possibility of juror prejudice exists, a trial judge is not required to explore (1) whether the jury has in fact become biased, and (2) whether alternatives to mistrial exist. In the absence of clear abuse, there is an apparent and special deference paid to a trial judge's exercise of discretion in the atmosphere of an influenced jury: the degree of influence is a subtle matter and best left to his perception. Therefore, if case law does not require a trial judge to canvass alternatives, it is illogical to demand that considered alternatives be expounded upon the record--there may be none.

Washington suggests that explicit findings of considered alternatives on the record will make the appellate court's

task a simpler one, with resulting fairer analysis. Such an approach misconceives the purposes of the double jeopardy provision and without warrant transforms the reviewing process into a checklist of the record. The appellate court should do what it has always done in a mistrial circumstance--scrutinize the facts of the case before it to determine if the trial judge could have found a manifest need to declare a mistrial.

V

THE ISSUE OF DELIBERATE DEFENSE PROVOCATION OF A MISTRIAL IS MOST PROPERLY BEFORE THIS COURT

Washington finally argues to this

Court that the issue of deliberate defense provocation is being raised for the first time by the State, "notably" not having been "raised or claimed in Arizona Superior Court, the Arizona Supreme Court, the United States District Court or the United States Court of Appeals [for the Ninth Circuit]". [Resp. Br. 25.] Inconsistent with this argument, he then tells this Court that the issue was argued by the State to the Ninth Circuit, but was not there submitted for consideration. Two portions of the State's Brief which Washington infers merely allude to this issue are cited in his Brief [Resp. Br. 26] for the contention that the Ninth Circuit was not presented with the issue by the State.

In opposition to Washington's assertion, the State specifically refers this Court to pages 44, 45, 48, 55, 61,

and 64-68 where the State makes crystal-clear their position that defense counsel engaged in a course of conduct calculated to improperly prejudice the jury against the state, and which circumstance left the County Attorney with little choice but to request a mistrial.

CONCLUSION

George Washington, Jr. quite naturally has denied that the circumstances of his second trial established "manifest necessity" or that the mistrial served "the ends of public justice" such as is necessary to prevent the Double Jeopardy Clause from barring his reprosecution. United States v. Perez, supra. The State believes that the avoidance of requiring the government to submit its case to a jury which had been improperly influenced against it during the course of a criminal trial is one of the legitimate ends of public justice which allows a mistrial upon the prosecutor's request, and does not prevent the defendant from being reprosecuted. Illinois v. Somerville, 410 U.S. at 464, 93 S.Ct. at 1070,; Simmons v. United States, 142 U.S.148, 154; 12

S.Ct. 171, 172, 35 L.Ed. 968 (1891).

Therefore, the State respectfully submits this Brief in Reply to Washington's several arguments.

DATED this 27th day of October, 1977.

STEPHEN D. NEELY
PIMA COUNTY ATTORNEY

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Victoria A. King
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SPECIAL DEPUTY

STATE OF ARIZONA)
) SS:
County of Pima)

I, VICTORIA A. KING, hereby certify that I have served a copy of the foregoing Reply Brief for the Petitioner upon Respondent George Washington, Jr., by personally delivering three copies of the same to (1) Edward P. Bolding, Esq., La Placita Village, Suite 402, Toluca Building, P.O. Box 70, Tucson, Arizona 85702, and (2) Frederick S. Klein, Esq., 306 Pioneer Plaza Building, 100 North Stone Avenue, Tucson, Az 85701, attorneys for Respondent, this 27th day of October, 1977.

Victoria A. King
VICTORIA A. KING

SUBSCRIBED AND SWORN TO before me this 27th day of October, 1977, by VICTORIA A. KING.

Notary Public

My Commission Expires:
6-16-78